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No. 97

In the Supreme Court of the United States

OCTOBER TERM, 1947

UNITED STATES OF AMERICA, APPELLANT

v.

JAMES HOFFMAN

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the district court (R. 28-30) is reported at 68 F. Supp. 53. The opinion of the United States Court of Appeals for the District of Columbia (R. 38-39), certifying the case to this Court pursuant to the Criminal Appeals Act, is reported at 161 F.2d 881.

JURISDICTION

The order of the district court dismissing the rule to show cause was entered October 8, 1946 (R. 30). Notice of appeal to the United States Court of Appeals for the District of Columbia was filed October 29, 1946 (R. 31). On March 31, 1947, the Government moved to certify the case to

the Supreme Court pursuant to the Criminal Appeals Act (R. 32-34), and on May 5, 1947, the Court of Appeals entered an order certifying the case to this Court (R. 40). On June 2, 1947, this case was set down for argument to follow *Shapiro v. United States*, No. 49, this Term.

The jurisdiction of this Court to review the district court's order on direct appeal is conferred by the Act of March 2, 1907, c. 2564, 34 Stat. 1246, as amended by the Act of May 9, 1942, c. 295, 56 Stat. 271, 18 U. S. C., Supp. V, 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, as amended, 28 U. S. C. 345.

QUESTION PRESENTED

Whether appellee who, in compliance with an administrative subpoena, produced business records required to be kept by a regulation promulgated by the Price Administrator, thereby obtained immunity from the present prosecution.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED

The pertinent provisions of the Constitution, the Emergency Price Control Act of 1942, and the Compulsory Testimony Act of 1893 are set forth in the appendix to the Brief for the United States, pp. 43-46, in *Shapiro v. United States*, No. 49, which precedes this case on oral argument.

In addition, the Act of June 30, 1906, 34 Stat. 798, c. 3920 (49 U. S. C. 48), provides as follows:

Under the immunity provisions in the Act entitled "An Act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the Act entitled "An Act to establish the Department of Commerce and Labor," approved February-fourteenth, nineteen hundred and three, and in the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, and in the Act entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

Section 12 of Maximum Price Regulation 540, promulgated June 10, 1944, effective July 10, 1944, 9 Fed. Reg. 6434, as amended September 12, 1944, 9 Fed. Reg. 10873, and May 9, 1945, 10 Fed. Reg. 5037, provided as follows:

§ 12. Records and reports.

(a) *Records.*—Every person generally engaged in the business of selling used cars shall, so long as this regulation remains in effect, keep and make available for examination by the Office of Price Administra-

tion the following information in regard to every used car he has acquired for resale:

(1) A complete description of the used car including make, model, year, serial number, motor number, body type and passenger capacity;

(2) The name and address of the person from whom he acquired the used car;

(3) The price he paid for the used car either on an outright purchase or on a trade-in;

(4) The cost of repairs and replacements made in the used car and a description of the repairs and replacements made;

(5) The name and address of the person to whom he sold the used car;

(6) The price he charged the purchaser for the used car excluding taxes and finance charges;

(7) The amount he charged the purchaser to cover taxes and the taxes for which the amount was charged;

(8) The amount he charged the purchaser for financing the sale on an installment basis, if any;

(9) A copy of the warranty he furnished the purchaser if he sold the used car at a price higher than the base price in Appendix B plus permissible equipment allowances in Appendix D.

(b) *Inventory report of used cars as of September 1st, 1944.*—Every dealer, or other seller generally engaged in the business of selling used cars, shall file with his

local War Price and Rationing Board not later than September 21, 1944, a report on the form in Appendix G, of all used cars in his stock as of September 11, 1944, inclusive.

(c) *Additional records and reports.*— Every dealer, or other seller generally engaged in the business of selling used cars, shall keep such records and file such reports in addition to those required by paragraphs (a) and (b) as the Office of Price Administration may from time to time require. Such additional records and reports, however, shall be subject to the approval of the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

STATEMENT

On May 11, 1945, a consent decree for final injunction was entered in the United States District Court for the District of Columbia restraining appellee and his employees from selling, delivering or offering to sell or deliver used passenger automobiles at prices in excess of the maximum prices established therefor by Maximum Price Regulation 540 or any other pertinent price regulation (R. 6-7). Thereafter, on February 27, 1946, the Price Administrator filed in the same court a petition for the institution of criminal contempt proceedings against appellee, alleging numerous sales in violation of the injunction. (R. 1-6). A rule to show cause issued

(R. 7), and at the same time, the court entered an order appointing the United States Attorney and the Office of Price Administration's District Enforcement Attorney "to prosecute the criminal charges contained in the petition filed herein on behalf of the Court and of the United States" (R. 8).

On September 23, 1946, appellee filed a motion to dismiss the rule to show cause on the ground that he was immune from prosecution for the transactions upon which the Price Administrator's petition was founded (R. 8).¹ In a supporting affidavit (R. 9-10), appellee stated that on January 11, 1946, he was served with a *subpoena duces tecum*, issued by the Office of Price Administration, requiring him to testify concerning sales of used passenger automobiles and to bring with him "any and all records required by the provisions of Section 12 of the Maximum Price Regulation 540 with respect to any and all automobiles purchased, or otherwise acquired, sold, delivered, or otherwise disposed of, from October 1, 1945 to the date of the service of this subpoena" (R. 9). Appellee further stated that he appeared with counsel at the time and place designated and claimed "all of the immunities from self-incriminating testimony as given by the Fifth Amendment of the Constitution of the United

¹ He later also filed a motion to suppress as evidence the books and records which he was compelled to produce (R. 10).

States and given by the Act, commonly known as the Compulsory Testimony Act (49 U. S. C. A. § 46)"; that notwithstanding this claim, the presiding officer at the hearing received the records produced in response to the subpoena; and that the rule to show cause was based on transactions revealed by the records which appellee compulsorily produced (R. 9-10).

The motion came on for hearing before Mr. Justice Holtzoff on October 4, 1946 (R. 11-27). The court thereafter entered its opinion and order (R. 28-30) dismissing the rule to show cause (R. 30). The court held that Section 202 (g) of the Emergency Price Control Act and the Compulsory Testimony Act of 1893 extend immunity to "any person who produces records in response to a subpoena issued by the administrative agency if the prosecution is to be based on information contained in such records," apparently without regard to whether the records are protected by the privilege against self-incrimination (R. 29-30).

SPECIFICATION OF ERRORS TO BE URGED:

The district court erred:

1. In holding that Section 202 (g) of the Emer-

* Appellee contended in the Court of Appeals that the United States was not a party to the proceedings in the district court and therefore that it has no right of appeal. The Court of Appeals did not pass on the contention; instead, the court suggested that since the case was being certified to this Court, the question was one for decision by this Court. *(continued on next page.)*

gency Price Control Act and the Compulsory Testimony Act extend immunity to one who produced records which are required by law to be kept and are thus outside the protection of the privilege against self-incrimination.

2. In granting the motion to dismiss the rule to show cause.

ARGUMENT

APPELLEE HAD NO PRIVILEGE TO REFUSE PRODUCTION OF THE RECORDS INVOLVED, AND HE THEREFORE OBTAINED NO IMMUNITY UNDER SECTION 202 (g) OF THE EMERGENCY PRICE CONTROL ACT.

The principal question here involved is also presented in *Shapiro v. United States*, No. 49, this Term, which precedes this case on oral argument.

In our view, the record plainly demonstrates that the proceedings in the district court involved a charge of criminal contempt, which by definition includes the United States as a party to the proceeding. *United States v. Goldman*, 277 U. S. 229, 235; *Ex parte Grossman*, 267 U. S. 87, 115; *Michaelson v. United States*, 266 U. S. 42, 67; see also, *United States v. Mine Workers*, 330 U. S. 258. Consistently with the procedure set forth in Rule 42 (b) of the Federal Rules of Criminal Procedure, the proceedings in the district court were instituted by a "Petition for the Institution of Criminal Contempt Proceedings" (R. 1-6), signed by the O. P. A. District Enforcement Attorney on behalf of the Price Administrator. The petition set forth facts which constituted a violation of the court's earlier injunction and prayed (R. 6), *inter alia*, that the court "appoint attorneys to prosecute the charge of criminal contempt on behalf of the United States and this Honorable Court"; that "the Court fix a date for a hearing on the charge of criminal contempt"; and that

Appellee gave no oral testimony at the administrative hearing, and he was not required to produce any books or records other than those which he was required to keep by Section 12 of Maximum Price Regulation 540. He did produce, in response to the subpoena, records showing his purchases and sales of used passenger automobiles during the period from October 1, 1945, to January 11, 1946.

As we point out in our brief in the *Shapiro* case (pp. 11-21), settled judicial decisions dating back to *Boyd v. United States*, 116 U. S. 616, and *Wilson v. United States*, 221 U. S. 361, establish that records which are properly required to be kept by law are not private records and are not protected by the privilege against self-incrimination. The records which appellee was required to produce were of that character. Having undertaken to buy and sell used cars pursuant to the

"the Court impose a sentence of fine or imprisonment or both upon the respondent, James Hoffman, in the event that the court shall find him guilty." On the basis of the petition the district court issued a rule to show cause why appellee should not be adjudged guilty of criminal contempt (R. 7), and at the same time the court appointed United States Attorney Curran and O. P. A. District Enforcement Attorney Walker "as attorneys to prosecute the criminal charges contained in the petition filed herein on behalf of the Court and of the United States" (R. 8). Thereafter, Walker appeared in court to oppose appellee's motion to dismiss the rule to show cause (R. 11), and when the motion was granted, a notice of appeal on behalf of the United States was filed by both court-appointed attorneys (R. 30-31). In the Court of Appeals, the Acting Solicitor General directly entered the case by filing a motion to certify the cause to this Court pursuant

terms of the Emergency Price Control Act and the applicable regulation issued by the Price Administrator, it was appellee's duty to maintain records showing his transactions in the regulated commodity. He performed that duty and in compliance with his responsibility under the Act, he disclosed the records to a representative of the Price Administrator upon proper demand.

In doing so, appellee claimed immunity pursuant to Section 202 (g) of the Emergency Price Control Act, and the district court—erroneously, we believe—sustained his claim. The district court did not concern itself with the question whether the records which appellee disclosed were constitutionally privileged from compulsory disclosure. Instead, the court held, as a matter of

to the Criminal Appeals Act (R. 32-34), and his representative participated in the argument of the motion in that court (see R. 37).

Quite plainly, the petition in the district court contemplated a criminal contempt proceeding and gave appellee notice of this fact. The district judge so regarded it, and appointed prosecuting attorneys, one of whom was the United States Attorney. The fact that Walker, who is not on the United States Attorney's staff, was also appointed does not detract from the criminal nature of the prosecution. The procedure has been sanctioned repeatedly. *United States v. Lederer*, 140 F. 2d 136, 138 (C. C. A. 7), certiorari denied, 322 U. S. 734; *McCann v. New York Stock Exchange*, 80 F. 2d 211, 214 (C. C. A. 2); *Phillips S. & T. P. Co. v. Amalgamated Ass'n. of I., S. & T. W.*, 208 Fed. 335, 344 (S. D. Ohio). See also, Rule 42 (b), F. R. Crim. P. Nothing which occurred in the courts below furnishes any basis for doubting the fact that the United States was an essential party to the proceeding.

statutory construction, that in Section 202 (g) and the Compulsory Testimony Act, Congress used broad language in granting immunity and did not except cases like this one where there is no constitutional privilege and, hence, no necessity for a grant of immunity. In our view, the decision overlooks the plain Congressional policy to exchange immunity only for evidence which is privileged and otherwise could not be had; the policy of Section 202 (g) which is to facilitate enforcement of the Act, and the language of the section which adopts the immunity provisions of the Compulsory Testimony Act only where the witness has a privilege and specifically claims it; and the guides which this Court laid down in *Heike v. United States*, 227 U. S. 131, 142, in rejecting the contention that the immunity statute should be construed to extend to the compelled disclosure of information which is not privileged. We have set forth these views at length in our brief in the *Shapiro* case, pp. 21-39, and the Court is respectfully referred to the arguments there advanced.

A further consideration, not involved in the *Shapiro* case, may be mentioned. It does not appear from the record in this case that the appellee was sworn and produced the records under oath, a condition precedent to the flow of immunity. Act of June 30, 1906, 34 Stat. 798, 49 U. S. C. 48 (*supra*, pp. 2-3). The history and purposes of the 1906 Act are reviewed at length in the Government's brief in opposition in *Peters v. United*

States, No. 256, this Term, pending on petition for certiorari. Since it was appellee's burden in the district court to establish that he was entitled to immunity, *United States v. Heike*, 175 Fed. 852 (S. D. N. Y.), appeal dismissed, 217 U. S. 423, this constitutes an additional ground on which the district court should have denied appellee's motion to dismiss.

CONCLUSION

We respectfully submit that the order of the district court should be reversed and the cause remanded to that court with instructions to proceed to a trial of the criminal contempt charge against appellee.

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